

JANUARY 29th, 1768.

[To be reported by Lord KENNET.]

MEMORIAL

FOR

CHARLES Earl of *Tankerville*, and DAVID
ERSKINE, Clerk to the Signet, his Attor-
ney and Factor;

AGAINST

John Duke of *Roxburgh*, and *Thomas Lilly*, Tackf-
man of his Grace's Fishings at *Kelfo*, and *William*
Mitchell, Tacksman of the Fishings at *Mackerston*. 88

THE noble and ancient Family of the Lords *Grey of Wark* were, for many Ages, possessed of a large Estate in the County of *Northumberland*, under the most ample Grants from the Crown of *England*, particularly, of the Castle and Lordship of *Wark*, and of Fishings in the River *Tweed* adjacent thereto, and which River is at that Part the Boundary between *England* and *Scotland*. This Estate and Fishings came by Descent to the more immediate Ancestors of the Earl of *Tankerville*, to whom the same, with all the Rights and Privileges thereto pertaining, do now belong.

The Estate of the Earl of *Home* lies on the North Side of the River *Tweed*, directly opposite to the Memorialist's Estate of *Wark*, on the South Side; and there is now, and has been for Centuries past, a Caul or Dam-dike, extending across the River, from Lord

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Home's Mill of *Fairburn*, at the North, to the Memorialist's Lands at the South.

The River *Tweed* is there extremely rapid, which renders it impracticable to carry on a Salmon-fishing to any Advantage by the Use of a Net and Coble, or any other Method than that which has been immemorially practised. In this Situation, it became necessary for the Heritors on both Sides, intitled to Fishing, to concur in carrying on a joint Method of fishing, such as was best adapted to the Nature of the River.

Hence it happened, in Times far beyond Memory, that the Parties agreed to have a Dike or Bulwark carried across the River, and resting on both the *English* and *Scots* Sides thereof, which, besides serving to supply Lord *Home's* Mill with Water, might more especially answer the Purposes of fishing for their joint Behoof. Accordingly this Dam-dike was erected, and has been always supported and repaired at the joint Expence of Lord *Home's* and the Memorialist's Families.

The Method of fishing at this Dike has been always in this Manner: Besides a large Gap or Opening towards the South End of the River, where Fish might freely pass, there are five small Holes in different Places, towards the Bottom of the Dike, in which Holes Pock-nets are put, and what are called *Back-nets*, are placed a little below, and a small Barricade of Stones made in the Channel of the River, to deaden the Stream where these Back-nets are. The Fish thereby caught have been equally divided between the two Noble Families, or their Tacksmen, in regard of their joining in supporting the Dike, and carrying on their common Fishing in this Manner.

Although such has been the Method of carrying on this Fishery for Ages past, yet, till now, no Challenge or Complaint was ever made of it. The superior Heritors had indeed no Cause to complain, because the large Gap or Opening in that Part of the Dike nearest the *English* Side, where the great Stream of the River runs, always gave free Access to Fish to escape those Nets, and get up the River, when there was so much Water in it that they could pass the Fords below; and the Dam-dike is so low, that, when there is any Swell of Water in the River, the Fish can easily pass over any Part of it. Hence it is obvious, that this Method of Fishing has not been more, but rather less prejudicial to the Interest of the superior Fishings, than if it had been carried on, either

ther by a Cruive-dike, or by Net and Coble, Methods specially authorised by the Law of *Scotland*, supposing these Methods alike practicable in this Part.

The Memorialist's Father, the late Earl of *Tankerville*, did, last Summer, very much to his Surprise, receive Information that, notwithstanding of the above Circumstances, *Lilly* and *Mitchell*, as Tacksmen of certain Fishings in the upper Part of the River, had, with Concurrence of his Grace the Duke of *Roxburgh*, insisted in a Process, first, before the Sheriff of *Berwickshire*, and now, before your Lordships, against the Earl of *Home*, and his Tenant, for having other Slops or Openings made in the said Caul at *Wark*, and abolishing Lord *Home*'s Method of fishing used thereat, the Tendency or Consequence whereof might be to affect his Right, and deprive him of a valuable Fishing, or Part thereof, which he and his Predecessors had immemorially enjoyed.

Lord *Tankerville*, tho' not versant in the Laws of *Scotland*, apprehended that none of these Laws could reach or affect an *English* Estate, and that your Lordships would not suffer the Execution thereof to take place to his Prejudice, if he could show sufficient Cause to the contrary. He therefore thought it proper to appear as a Party in the said Cause, to support his Interest in this Matter, in order that he might lay before your Lordships such Objections as might occur to him against the sustaining the Claim of the said *Lilly* and *Mitchell*, at least so as to prejudice the Estate and Right held by him in *England*, either directly or consequentially.

For these Reasons the late Earl of *Tankerville* did direct Council here, to make a proper Application to your Lordships in his Behalf, to be admitted a Party in the said Process; but the Earl having his Estate and Residence in *England*, a formal Power of Attorney from him was necessary for authorising such an Application. A Letter of Attorney was accordingly granted, by the late Earl, to Mr. *David Erskine*, but his Lordship having died before the Commencement of this Session, a new Commission to the like Effect was lately granted by the Memorialist, the present Earl, and upon a Petition for his Lordship and his Attorney, your Lordships were pleased to admit the Earl as a Party in the said Cause, and to remit to the Lord *Kennet* Ordinary, to hear his Council, and those of the other Party, upon his Interest, and the Merits of his Objections.

Council

Council were accordingly heard before the Lord Ordinary, and the Debate being taken to Report, and Memorials appointed to be given in, this is now offered upon the Part of the Earl of *Tankerville*.

Before entering upon the Argument, it is necessary to take notice of the State of the Cause between *Lilly* and *Mitchell* and Lord *Home*.

The Pursuers Action is founded on the 33d Act of the *Scots* Parliament 1696, which recites, " That the Salmon-fishing *within*
 " *this Kingdom* is much prejudged by the Height of Mill-dams that
 " are carried through the Rivers where Salmon are taken, and ordains a constant Slop in the middle Stream of each Mill-dam-dike ; and, if the Dike be settled in several Grains of the River, that there be a Slop in each Grain, (except in such Rivers where Cruives are settled,) and that the said Slop be as big as conveniently can be allowed, providing always the said Slop prejudice not the going of the Mills situate upon any such Rivers. Likewise, it discharges all fishing at such Mill-dam-dikes, with Nets stented or otherways, or any other Engines whatsoever, under the Pains inflicted by this and former Acts, against Killers of Black Fish, and Destroyers of the Fry of Salmon." After some Proceedings before the Lord Ordinary, in which the Duke of *Roxburgh* appeared in support of his Tacksman's Plea, the Cause was reported ; and your Lordships, on the 22d *July* last, were pleased to pronounce this Interlocutor : " The Lords find, that the Act of Parliament 1696 comprehends the River *Tweed*, where that River runs within the Jurisdiction of the Courts of Law in *Scotland* ; and that the Dam-dike or Dam-head in question, from the North Bank of the River to the Middle thereof, is subject to the Regulation of that Act ; and therefore, that the Suspenders ought to remove all Nets and Engines prohibited by that Act, and ought to make a Slop in the foresaid Part of the Dam-dike where the mid Stream or Current thereof runs, and remit to the Lord Ordinary to proceed in the Cause accordingly : " And, in pursuance of this Interlocutor and Remit, the Lord Ordinary, on the 25th *July*, " ordained the Defenders to remove the Nets and Engines betwixt and the 6th of *August* next, and, in case they fail, authorises the Pursuers to remove them upon the Defenders Expence, and prohibits and discharges them from placing or using them in the Dam-dike in Time coming ; and appoints

“ points the three Holes in the Dam-dike, 'twixt the Middle of
 “ the River and the North Bank thereof, to be kept open, except
 “ when the Sheriff shall find it necessary, upon Application of the
 “ Defenders, to shut all or any of these Holes for a Time, when
 “ their Mill may happen to want Water, and decerns accordingly.”

Against these Interlocutors a Reclaiming Petition was offered for Lord *Home* and his Tacksmen, to which Answers have been put in for the Duke and the other Pursuers, both as yet unadvised by your Lordships. So far the Cause had proceeded before the Memorialist was heard upon his Interest; and as it is probable your Lordships will advise the above Petition and Answers at the same Time with the Debate between the Pursuers and the Memorialist, it will be unnecessary for the Memorialist to enlarge upon such Topics as are already treated in Lord *Home's* Petition, and apply likewise to the Plea maintained by him.

The Argument upon the Part of the Earl of *Tankerville* has been directed for establishing these two Propositions, viz. 1mo, That the *Scots* Laws or Statutes could not be intended, and cannot therefore be understood, to extend to the regulating the Fishings in this Part of the River *Tweed*, where it is the Boundary between the two Kingdoms. And, 2do, That, supposing these Laws and Statutes could bear the Construction of extending over the *Scots* Interest in this River and Fishings; yet these Laws cannot affect an *English* Estate, belonging to an *Englishman*, and, consequently, not subject to the Authority and Jurisdiction, either of the Legislature of *Scotland*, or the Courts of Justice therein established. The Conclusion drawn from both, or either of these Propositions, if established, is, that no Regulation can be imposed even upon Lord *Home* or his Tenant, respecting their Interest in the River and Fishing, which can directly or consequentially affect the Interest of Lord *Tankerville*, or tend to restrain his Enjoyment of the Fishing belonging to him, in the same Manner, and as fully and freely, as the same has been used and enjoyed by his Predecessors for Ages past.

Although such are the Propositions which the Earl of *Tankerville* has endeavoured to maintain, yet it seems unnecessary to separate the particular Reasons urged for him, as tending to support the one or the other of those Points, because, that every Argument tending to show, that it is *ultra vires* of the Legislature, and Courts of this Country, to affect or reach an *English* Estate,

do likewise tend to prove, that the *Scots Acts* could not be meant or intended to reach this Case, at least, so far as the Earl is interested. And, on the other hand, if it should appear to your Lordships, that these Acts were not intended to reach this Case, there cannot be the least Doubt, that an Action founded upon them cannot be sustained, or a Decree carried into Execution, in prejudice of an *English* Heritor.

In trying this Question, your Lordships will have a Retrospect to antient Times, before the Crowns of *England* and *Scotland* were wore by the same Sovereign, as well as before these Kingdoms were happily united, and incorporated into one. The State of Things, in those early Times, is not only useful for discovering the Intendment of Statutes made in *Scotland* before the Union, but it is also necessary in another respect, for determining your Lordships Judgment; because, notwithstanding the Union of the Kingdoms, the Laws of each is preserved entire and independent. Your Lordships therefore will not incline to give any Judgment now, which you would not have given, had neither the Crowns nor the Kingdoms been united; and the Memorialist must, with great Deference, say, that no Decree now pronounced can be available, which would not have been effectual, had no Union taken place. The Question, therefore, will be now considered upon the same Footing, as if *England* were still a Country quite foreign to *Scotland*.

It is an agreed Fact, that the River *Tweed* is, in this Part, the Boundary between the two Kingdoms; but whether the whole River is to be considered as a Line drawn between them, and belonging properly to neither; or whether it is to be held as common to both; or, lastly, whether each Kingdom is to be understood as extending in to the Middle of the River, are Questions that are *juris publici*, and in determining which the chief Aid must be drawn from the Nature of this Boundary, the Transactions of former Times, and the Possession that has been held by the Parties respectively upon it.

By the Civil Law, Rivers, such as this is, were held as publick. *Justinian's* Words are: *Flumina autem omnia, et portus, publica sunt; ideoque jus piscandi omnibus commune est in portu fluminibusque.*---
§ 2. *Inst. de rerum divisione.* Such is the Civil Law with respect to Rivers, even though lying entirely under the same Kingdom or Government. The Law of *Scotland* has, indeed, so far departed from
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from it, that navigable Rivers, and the Salmon-fishings therein, are *inter regalia*, and held to belong to the Sovereign, who may grant such Fishings to private Persons, without Prejudice always to the public Uses of Navigation. But still where a River forms the Boundary between independent States, their Interests in it must depend upon the publick Law; and therefore, as by the Civil Law Rivers were held to be publick, and the Use thereof common to all, so it must follow, that such a River must be held either as belonging to neither Kingdom, or as common to both. The first Conclusion might be attended with Prejudice and Inconveniency to both, and therefore the last falls to be preferred. At the same time, a River's being considered in this light, does not hinder the respective Sovereigns from granting to particular Subjects, with their Lands adjacent, a Right, exclusive of their other Subjects, to such Privileges in and upon the River, as are consistent with its being still common to the two States. Thus they may grant Rights of Fishing, but the Nature and Exercise of such Rights must still be agreeable to the common Use of the River, and not prejudicial to the like Right and Interest in a Subject of the opposite State.

The Argument that has been used for holding the Middle of the River as the proper Boundary, and each Half as properly belonging to the State to which it adjoins, seems to be founded on no other Authority than the Common Law, respecting the *alveus*, or Channel of the River, whereby, if a River totally deserts its Channel, the Property thereof is held to belong equally to the opposite Heritors.---But this Rule does not afford a sufficient Ground for holding the like Property to obtain, where the River does exist and occupy its Channel.

While the River exists, the Channel itself, as well as the Water, is publick, and the conterminous Heritors have no more Interest in it than others, unless they happen to have Rights of Fishing specially granted to them, or established by Prescription. Even where that is the Case, they are seldom limited to the Exercise of such Fishing within the exact Half of the River lying next their Grounds, but often extend their Nets to the opposite Side, or fish Shot about. But when the River deserts its Channel, or alters its Course, the *alveus* ceases to be publick, and falls proportionally to the conterminous Heritors, as Part and Pertinent of their Lands. Upon this Principle, were the River *Tweed* to desert the Spot in question, the Middle of its present Channel might perhaps become
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the Division of the two Kingdoms; but while it continues a River, the whole of it is publick and common, unless in so far as, either by Treaties, or by very antient and continued Possession, it has been fixed and determined that the Whole, or a certain Part of the River, at any particular Place, shall be appropriated to, and belong to the one State, or the Subjects thereof.

Indeed, whatever Principles may apply, or Rule obtain, for determining the Interest of the Parties in a common River, where it is left uncertain, yet these must give way to Covenants and Treaties, or to the Effect of long Possession, held by the one, and acquiesced in by the other, as implying Accession thereof to that Party, who has held such Possession. And therefore, supposing that, upon this River, the whole Fishing and other Uses, at a particular Part on both Sides thereof, had either been expressly ceded by the one State to the other, or that the Subjects of the one State had immemorially possessed or occupied such extensive Right, unchallenged by the other, the River, or Fishings thereon, at that Part, would fall to be held as appertaining solely to that State which had enjoyed it, and the municipal Laws of the other State could not extend to, or affect it, as being a Subject beyond the Jurisdiction thereof.

And this Distinction is laid down by *Grotius*, although he seems inclined to hold that, *in dubio*, the Middle of the River is to be considered as the March:--- “*Quamquam vero in dubio, ut diximus, imperia ad medietatem fluminis utrinque pertingunt, fieri tamen potuit, et contigisse alicubi videmus, ut flumen totum parti uni accederet, quia scilicet ripæ alterius imperium ferius, occupato jam flumine, cepisset, aut quia eum in modum res pac-tionibus esset definita.*” Lib. 2, C. 3, § 18.

What is above submitted to your Lordships, is supported and confirmed in this particular Case, by what appears to have been the Apprehension and the Practice of the two Governments before they were united. Your Lordships well know, that the regulating the Borders or Confines of the two Kingdoms of *Scotland* and *England*, was an Object of many Treaties and Conventions, as well as the Occasion of many Wars between the two Nations. On those Occasions, where pacifick Measures were intended, the Government of neither Kingdom presumed to determine, of its own Authority, Matters in which the Interest of both were alike concerned; they therefore appointed Commissioners to treat and settle such Matters as were proper for good Order and Government
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on the Marches, and they appointed Wardens to execute what was so settled by Treaty. Many of these Conventions have been preserved, and got the Name of the *Border-laws*; and some of these do prove, that Possession was allowed the utmost Weight in ascertaining the Interest of the Subjects of each State, or what should be held Pertinent of each Kingdom; and that, more particularly, the Fishings in this River *Tweed* were regarded as the proper Subject of Settlement by Treaty, and were, in such Treaty, commonly sustained according to the long Possession that had obtained in Times of Peace and Tranquillity.

Sir *James Balfour*, in his Practicks, gives this Account of the *Border-laws*: "The Laws of Marches, or Border-laws, betwixt
 " the Realms of *Scotland* and *England*, in the Time of Peace, are
 " common and indifferent to the Subjects of both the Realms, the
 " Grounds and Effect of the same Laws either being contained in
 " the Contracts and Treaties of Peace passed betwixt the Princes or
 " their Commissioners; or then they are ancient and loveable Customs, received and standing in Force as Law, by long Use and mutual Consent of the Wardens and Subjects of both the Realms."

Balfour proceeds to give a Summary or Abstract of those *Border-laws*, but the Treaties or Conventions themselves, so far as have been preserved, are collected by *Nicolson*, Bishop of *Carlisle*, and sundry Rules are to be there found which are not in *Balfour*. Various Regulations are thereby laid down for the Punishment of Crimes, the Recovery of Debts, &c. upon the Borders, by Authority of the Wardens, and, *inter alia*, there is a Treaty between *Edward VI.* of *England* and *Mary Queen of Scotland*, in 1549, the 5th Article whereof is in these Words: "Item, It is covenanted and agreed, that so many, and such Fishings in the Flood of
 " *Tweed*, from the Bounds and Limits of *Berwick*, ascending upwards to *Rydingburne*, even as many and such shall appertain to
 " the Kingdome of *Scotland*, as notoriously did appertain thereunto before the Beginning of the said Wars, and by the Scots
 " were haunted, and by Use exercised and holden of the same
 " Manner, as by Right they might."

And, in another Treaty between the Commissioners of both Kingdoms, under the Reign of *Queen Mary of England*, anno 1553, it appears, from the 8th and 9th Sections, that certain Questions or Disputes concerning Fishings in this Part of the River *Tweed*, were brought to Trial before these Commissioners, particularly

P. 602.
cap. 14.

Border Laws,
P. 60. § 5.

Border Laws,
p. 78.
Balfour's
Practicks,
p. 604.
cap. 18.

cularly one between the Lord *Home* and *Richard Bowes*, Esq; Captain of the Castle of *Norham*, as to Lord *Home's* Fishing near that Castle, which had been usurped by the Captain some Time before the Treaty, and another between *Home* of *Manderston* as in Right of the Priores of *Coldstream*, and *Selby* of *Twizzel*, as to a different Fishing. The Treaty bears, both according to Bishop *Nicolson's* Edition of it, and the Abstract given by *Balfour*, "That upon Proofs and Examinations thereon taken before the saids Commissioners," they determined the Rights of the Parties, both as to the Extent and Manner of exercising their Fishing. They adjudged to Lord *Home* and the Priores of *Coldstream* their respective Fishings, according as they have been used and possessed, and in like manner as other *Scots* Fishings had been used therein; and, on the other hand, they adjudged to *Selby* of *Twizzel* a more limited Fishing, by what is called a *Ring-net*, to be used at a particular Spot.

Further, by the 10th Section of the Treaty, "It is concluded and ordered, that if any of the Subjects of both Realms unlawfully trouble, stop, or make Impediment to the Subjects of the opposite Realm, in his or their Fishing in the Water of *Tweed*, so that he may not thereby use and fish his Fishing, according to the Virtue of these *Trewes*, that it shall be lawful to the Party grieved, to give in his Complaint to the Warden of the Marches where the Offender is dwelling, which Warden shall cause the said Offender to be attatched to the Day of *Trewes*," and, upon Conviction, shall condemn him in a Penalty or Damages to the Party aggrieved.

From these Treaties and Conventions, it is apparent, *imo*, That in doubtful and debateable Matters, as well of a Civil as of a Criminal Nature, occurring upon the Borders or Confines of the two Kingdoms, it was not thought competent for the Government or Courts of either Country to determine or settle them, but the same were either adjusted by a joint Meeting of Commissioners mutually chosen, or left to the Cognizance of the Wardens respectively, in whom were vested the joint Authority of both Nations to determine and regulate the same.

2do, That in those Treaties, that Part of the River *Tweed* now in question, as being the March or Boundary between the two Kingdoms, together with all the Rights of Fishing, and other Privileges

privileges competent to the Subjects of either Country, were held to be so far common, as not to be liable to the Rules made or Judgments given in the proper Courts of either Country, but to be only subject to such Regulations and Decrees as were made or passed thereanent by the Commissioners of the two Kingdoms, or at least by the Wardens, to whom the same joint Authority was delegated. And,

3thio, That, in the Proceedings of those Commissioners, they had special Regard to the ancient Use and Possession which had obtained, or been held by the Subjects on both Sides, and did determine disputable Rights accordingly.

Such were the Principles and Practice of ancient Times, and they were apparently just, and properly adapted to the Nature of the Case, as, without mutual Consent, or open Violence, the Government of one Country can never regulate Rights that are common to its Subjects, with those of another Country. Where such a Thing as a River intervenes between them, in which both have certain Rights and Interests, it is impossible that these can ever be properly ascertained, otherways than by Treaty or Agreement.

It often happens, that in one Part of such a River, the total, or most ample Possession, belongs to the Subject on one Side, in other Parts, immediately below or above, the Right is reversed, and in such Cases as the present, both Parties having possessed promiscuously, are entitled to a joint and indivisible Right. Where such Variety of Cases occur, it would be manifestly absurd, that in one Spot one Law should obtain, and, in a different Spot, perhaps within a few Yards, a different Law should take place, that where an *Englishman* is entitled to fish quite across the River, he may do it in a Way that a *Scotsman* cannot, though also entitled to fish across, and still more, that where there is a joint and promiscuous Fishing belonging to a *Scotsman* and an *Englishman*, the Proceedings and Interest of the one should be subject to a certain Authority, which cannot extend to the other.

What has been said will, it is hoped, satisfy your Lordships, that as Things stood anciently and down to the Union, there was no such Division of the River as is here contended for by the Pursuers. There is not the least Vestige of such Line or March as the Middle of the River to be found in the Records of Antiquity, nor does it appear that such a Division ever was thought of by any concerned, sooner than the present Time. The Observance of it

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was, of old, utterly impracticable, and the way in which this River was uniformly enjoyed and regulated, is altogether incompatible with any such Idea. Neither *English* nor *Scots* ever before pretended to a Power or Jurisdiction, that far, and no further.

It cannot therefore be presumed, that any Statute made in *Scotland* could, without the most express Enactment, be intended to apply, or extend to that Part of the River *Tweed*, which still continues the Boundary or March between the two Countries. In the ancient *Scots* Statutes, preceeding the 1600, relative to the Salmon-fishery, and for preventing Fishing in forbidden Time, &c. the Rivers of *Tweed* and *Annan* were always excepted. The Reason of this Exception is expressed in the Act 1600, viz, " that the Forbearance upon the *Scots* Part could not have made Salmon any more to abound in these Waters, if the like Order was not observed upon the *English* Side ;" and as this Difficulty was then supposed to be removed, the Exception of those Rivers, from the general Regulation, was thereby taken off. But this Alteration cannot afford a ground for presuming, without any express Enactment, that the subsequent Act, 1696, in so far as respected the Regulation of Dam-dikes, and Fishing thereat was also meant to apply to the Part of the River *Tweed* now in question.

The old Acts as to Fishing in forbidden Time, and even the Act 1600, were enforced by corporal Punishment upon the Offender, and, consequently, they might be executed if the Offender happened to be subject to the *Scots* Jurisdiction, without that Jurisdiction being applied to the ordering Buildings erected, or the Method of carrying on Fishings within the common River. The *English* could not find Fault with these Acts, whether they observed the like Regulation or not, because the hindering the Subjects of *Scotland* by a personal Prohibition to fish at a certain Time, might be beneficial, but could never be hurtful to the Subjects of *England*. Neither did the Execution of those prohibitory Acts, inroach upon their independent Right in the River, as nothing was thereby done within the Bounds of the River. But the Case is quite different with respect to the Regulations now in question, seeing they are not mere personal Prohibitions on the Subjects of *Scotland*, but do direct the Form and Construction of Dam-dikes and Fishing thereat, in such a Manner as can only be executed by
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an Act of Power in and upon the River, and therefore do directly tend to arrogate to the Legislature and Courts of the one Country, what is only competent to those of both, and which may also be attended with Prejudice to the Subjects of *England*, in the Enjoyment of their independent Rights. The Act 1696, therefore, which is silent as to this River, and imposes new Regulations for *Scotland* alone, can never be understood as intended for that Part of the River which is not entirely within *Scotland*, but is common to both Countries.

This too is confirmed by the constant and uninterrupted Usage which has obtained as well since as before that Act 1696. The Pursuers do not pretend that, till the Commencement of the present Action, the Regulations of that Act ever were observed, or any Attempt made to force the Observance of them, even in any Part of this River, although they have been observed and enforced in all the other Rivers that are entirely within *Scotland*; *consuetudo est optima legum interpret*, and as in *Scotland* contrary Usage for great Length of Time has even the Force of abrogating an express Statute, *a fortiori* must an uninterrupted Usage for near a Century since this Act, and while the Dike and Fishing in question have been constantly used and enjoyed in the Manner complained of, be sufficient to explain the Sense of that Act as not extending to this River, more especially, when such Extension seems adverse to Principles, as well as to the Practice and Understanding of former Ages, and the Powers of that Legislature, by whom the Statute was made.

And this leads the Memorialist to observe, that even supposing such an Act had been intended to have the Effect which the Pursuers would give it, yet it could not be executed by your Lordships, both because this Part of the River is the common Property of both Countries, and because, in this special Case, it is impracticable to execute it with regard to the *Scots* Interest or Estate, without encroaching upon, and even destroying the *English* Right and Estate belonging to the Memorialist. The constant and uninterrupted Possession by both Parties, of the Fishing upon the whole Dike, without Division, has established in both a common Right and Property *pro indiviso*, which cannot be separated, nor the Right of the one affected without involving in it the Right of the other. If the one Half of the Dike shall be thrown down or laid open, it must deprive Lord Tankerville of his legal Right of
D. Fishing

Fishing on that Part of the Dike, and also render the other Half of no Value, even supposing it were appropriated to him. The putting an End, therefore, to this joint or common Fishing, cannot be competent to the particular Courts of either Country, but either, as in ancient Times, must be done by Commissioners for both Countries, or by an Act of the united Legislature of both.

It is already proved, that long Possession was formerly held sufficient to ascertain the Rights of the different Subjects respectively in this River. The Memorialist's Fishing, therefore, having been immemorially exercised upon the North as well as upon the South Side of the River, is an *English* Fishing, appertaining to an *English* Estate, and belonging to an *English* Man; and your Lordships, who are particularly careful in not exceeding your legal Powers, will not attempt to execute any *Scots* Act of Parliament in such a Manner as to deprive Lord *Tankerville* of the whole or any Part of his *English* Estate in or upon this River.

Again, the Circumstance of Lord *Home*'s having a joint Interest with the Memorialist, in and upon this Dike and Fishing, and of his being a *Scots* Man, and having a *Scots* Estate, can be no Ground for affecting the Memorialist's Right, as hitherto enjoyed *pro indiviso* with him. The common and promiscuous Possession of the Subjects of both Countries shows, that this Part of the River cannot be divided or held as belonging partly to *Scotland* and partly to *England*. Besides, the Subjection and Obedience which Lord *Home* owes to the Laws of his own Country, can no more affect the Memorialist than his Deed or Contract could do. Let the Case be supposed, of two Proprietors *pro indiviso*, of a Subject wholly situated in *Scotland*, and that the one of these Proprietors, without Consent of the other, should, by express Covenant, subject his Estate to a Servitude in favour of a third Party, or to the Jurisdiction of a neighbouring Barony or Lordship, surely this could not affect the Interest and Estate of the other Coproprietor, who had by no Act or Deed subjected either himself or his Property to any such Burden. For the same Reason, if it could be supposed, that your Lordships would incline to compel Lord *Home* to an Observance of the Regulations in question, yet his Situation could not affect Lord *Tankerville*, who would be even intitled to resist and oppose Lord *Home*'s Compliance with them to his Prejudice.

The Case of the River *Tweed*, in this Part, may also be compared to that of a Land-commonty upon the Border, of which,
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it is informed, there have been many Instances, where the Subjects of both Kingdoms jointly enjoyed the Pasturage and other Benefits thence arising; the Laws of *Scotland*, surely, could not reach any such Commonities, far less hurt or affect the Interest of the *English* Heritors therein. Thus, for Example, in such Commonities, the *Scots* Laws as to Hunting, Fowling, and Moor-burn, would take no Place. 2^{do}, There could be no Souming and Rouming there, as obtains in *Scots* Commonities. 3^{tio}, No Division thereof could be made conform to the valued Rent. And, 4^{to}, Such a Common could not be at all divided by the Authority of a Decree of this Court, under the *Scots* Acts of Parliament, nor by any other Authority than that of a Commission, as in former Times, or by a *British* Act of Parliament. Now, if such be the Case of a Commonity upon Land, *a fortiori* must the like obtain as to such a River as the *Tweed*, which, by its Nature, is publick, and which it has been immemorially held to be the common Boundary of the two Nations.

On these Grounds the Memorialist concludes, that the *Scots* Act 1696 cannot be held or understood to extend to this Part of the River *Tweed*; and that, supposing it could be so understood, yet that it is incompetent for your Lordships, as a *Scots* Court, to execute the said Act, in the Manner expressed in the Interlocutors pronounced by your Lordships and the Lord Ordinary, upon the Question between the Pursuers and Lord *Home*, because the Consequence thereof would be the depriving the Memorialist of the Fishing which he and his Ancestors have for Ages enjoyed unchallenged, as Part of his *English* Estate, though used and exercised, as well upon the North Half or Side of the River as upon the South; and that, in applying the *Scots* Regulations, it is impossible to separate the Interest of Lord *Home* as a *Scots* Heritor, and that of the Memorialist as an *English* Heritor, both being intitled to, and having always enjoyed this Fishing in common, and *pro indiviso*. It remains then only to notice such Objections to the Memorialist's Plea, as have been stated by the Pursuers, and not already obviated.

In the first place, it has been said, that the Pursuers Argument, Object. 1st. for having the Middle of the River held as the March, is supported by the Necessity of the Thing, for that otherways this River would be subject to no Law, either as to the Punishment of Crimes committed

committed upon it, or the ascertaining Rights of Property within it.

Answer.

But to this it is answered, that, by the ancient Treaties above mentioned, Provision was made for the Punishment of Crimes committed upon the Borders; and, as the criminal Law of both Countries is nearly the same, and both have a common Interest in the River, the Cognizance of such Crimes might be competent to the Country, in which the Offender had his Domicile, and was apprehended. The Courts of each Country, too, might determine in civil Questions between its own Subjects, respecting their Claims to established Rights in this River. For Example, your Lordships might determine between Lord *Home* and any other Person claiming Right to the Fishing of *Fairburn-mill*, as an acknowledged *Scots* Fishing, granted with a *Scots* Estate, although it might not be competent for this Court to execute Regulations of a publick Nature in and upon the Dikes and Fishings within the River, in virtue of a *Scots* Act of Parliament. But even supposing the proper Courts of neither Country could exercise any Acts of Jurisdiction respecting the Interest of Parties in this River, as Matters now stand, yet still it does not lie with your Lordships to give a Remedy, by exceeding the Bounds of your legal Powers. No such thing was attempted before the Union, and, in this Particular, Things stand on the same Footing at this Day; it belongs to the Parliament of *Great Britain* to create such a Jurisdiction, or give such a Remedy as the Case may seem to require, although, in the present State of Things, no Inconveniency has hitherto arisen.

Object. 2d.

2^{do}, The Pursuers have observed, that, among the List of the unprinted Acts of the 1st Session of the 2^d Parliament of King *Charles II.* anno 1669, Mention is made of "a Recommendation to the Heritors of the Sheriffdom of *Berwick*, concerning their fishing on *Tweed*," from which the Pursuers have inferred, that the Parliaments of *Scotland* did consider itself as having a Power over the *Scots* Fishings in *Tweed*, and did exercise that Power accordingly.

Answer.

In fact, however, it must be noticed, that the Recommendation mentioned in the printed List cannot be found among the Publick Records, so that nothing of its Import can be known further than appears from the printed Title, which can never show that the Parliament held any Part of this River, so far as it is the Boundary of the two Countries, to be properly within *Scotland*, or subject to *Scots* Statutes. For ought appears, the Recommendation might have

have proved directly the reverse, and shown, that the Parliament did not mean or intend, that the Fishings in this Part should be affected by any of the publick Regulations obtaining upon other Rivers that were entirely within *Scotland*, which indeed is the more likely, not only in respect of the Reasons already given, but because in some former *Scots* Acts respecting the Salmon-fishing, whereby Commissioners were named for executing them upon the capital Rivers of *Scotland*, none such were appointed for the River *Tweed*.

And, 3^{tio}, The Pursuers have alledged, that a Law or Regulation, similar to that of the *Scots* Act 1696, against fishing at Mill-dam-dikes, or with stented Nets, &c. does obtain in *England*, and, for instructing it, they have referred to sundry *English* Statutes. Hence they conclude, that there is neither any Absurdity nor Hardship in your Lordships executing the *Scots* Law upon this River, so far as the same, or the Persons interested therein, are subject to the Jurisdiction of this Court. Object. 3d.

But here the Memorialist, in the first place, cannot admit that Answer. the Law of *England* is such as the Pursuers would represent it. In this Cause and Court, Lord *Tankerville* is not hitherto any more than the Pursuers, assisted by Council learned in the Laws of *England*; and, among the great Number of Statutes, Precedents, &c. composing that Law, it is more than probable, that Strangers to it may, in their Researches, overlook what is most material to the Point, or misapprehend the Meaning and Intendment of what they happen to discover, and appears to them most favourable to their Plea. The Fact that is acknowledged on all hands of this Dike and Fishing in question, having been, for Ages past, exercised and enjoyed as it now is, without Challenge from any Quarter, and that no such Regulations as those of the *Scots* Act 1696 have ever been executed or regarded on this Part of the River, do afford the strongest presumptive Evidence, that no such Regulations have obtained in *England*, or at least that they were not understood to extend to the River in question.

2^{do}, That this is the Case, appears to the Memorialist's Council to be supported by Consideration of the *English* Statutes referred to by the Pursuers, and others upon the same Subject. The first of these is *Magna Charta*, cap. 23. which provides, "That all *Wears* from hencefurth shall be utterly put down by *Thames* and *Medway*, and through all *England*, but only by the Sea-coasts." The next Statute is the 15th *Henry VI.* which prohibits

bits the continual Use of standing Nets and Engines called *Trinks*, which used to be fastened to Posts, Boats, and Anchors. The 3d Statute referred to, is the 12th of *Edward IV.* cap. 7. which imposes Penalties on those who did not obey the Orders of Commissioners who had been appointed for regulating *Wears*, Mills, Mill-stanks, Staiks, and Kedles in navigable Rivers, for avoiding the Straitness thereof, and preventing the Drowning of Meadows, &c. And the last Statute referred to, is the 1st of *Queen Elizabeth*, cap. 17. which provides, that no Person “fish with any Manner of Net, Weels, Butt, Taining, Kepper, Lime, Trole, Raw, Tragnet, Trolnet, Trimenet, Trim-boat, Salt-boat, Weblister, Sewr, Lammet, or with any Device or Engine made of Hair, Wooll, Line or Canvas, or shall use any Heling-net or Trim-boat, or by any other Device, Engine, Cautel, Ways or Means whatsoever, shall take and kill any young Brood, Spawn or Fry of Eels, Salmon, Pike or Pickeril, or of any other Fish, in any Floodgate, Pipe at the Tail of a Mill, or in any Straits, Streams, Brooks, Rivers, fresh or salt, within this Realm of *England*, *Wales*, *Berwick*, or the Marches thereof; nor shall take or kill any Salmons or Trouts not being in Season, &c.”—and concludes with this Exception, “That this Act, nor any thing therein contained, shall not extend to the Fishing or River of the Water of *Tweed*, nor to any River or Water whereof the Queen’s Majesty is answered by any yearly Rent or Profit, &c.”

Upon these *English* Statutes that have been referred to by the Pursuers, it must be observed, that it is not clear that the Engines therein described are such as are now in question. But supposing them to be so, it seems plain that none of those Statutes did apply to the River *Tweed*, as it is mentioned in none of them but the last, in which it is expressly excepted from the Regulations. Besides, there are several intervening Statutes overlooked by the Pursuers, which shew that the original Prohibition of those Engines only applied to forbidden Time; particularly the Statute of the 13th of *Edward I.* cap. 47. which prohibits the taking of Salmon “from the Nativity of our Lady unto *St. Martin’s Day*,” and likewise, “that young Salmon should not be taken or destroyed, by Nets or other Engines, at Mill-pools, from the Midst of *April* to the Nativity of *John the Baptist*.”

The above Statute of *Queen Elizabeth*, it is true, seems to contain a total Prohibition of the Use of any Engines for the Purpose
of

of destroying young Salmon, though it still allows them to be used for catching other small Fish. But the Dikes and Nets in question are not used *of purpose* to take or destroy the Fry, but necessarily as the only Means in that Part of taking Salmon. Besides this Statute, as already noticed, expressly excepts the River *Tweed*: And although the Pursuers have said, that the Exception was afterwards abrogated by another Statute of the 1st of *James* the First cap. 25; yet the Memorialist finds no more in this last Statute, than the Title of the Act of Queen *Elizabeth*, which is thereby, along with many others, made perpetual.

However, supposing that the Pursuers were able to satisfy your Lordships, that by any *English* Statutes still in force, the Fishing at Mill-dams is expressly prohibited, and that such Statutes do extend to the *English* Part of the River *Tweed*, it could not afford any good ground for your Lordships pronouncing a Judgment, tending to encroach upon, or destroy any Part of that Fishing, which Lord *Tankerville* and his Ancestors have immemorially enjoyed. His Estate and Right are noways subject to your Lordships Jurisdiction, and if the Pursuers, or any others, shall be intitled to challenge his Method of exercising the same, they must sue him before a competent Court, which no Court of *Scotland* can be. Such Regulations, as already shown, can only be executed upon this common River itself, by some Court or Commission having the joint Authority of both Countries, or appointed by the united Legislature of both. And even supposing those Regulations could be enforced in the way of personal Prohibition, or Penalty upon the Subjects of the two Countries respectively, for making them forbear to prosecute certain Methods of Fishing; yet that Remedy could only be applied by the Courts of the Country to which the Parties are subject; and the having that Power could not enable these Courts to do or cause to be done any direct Act, such as opening Mill-dams, &c. within and upon the common River, far less to make these Alterations to the manifest Prejudice of others, having a joint Estate and Interest therein, and over whom their Jurisdiction noways extends.

In respect whereof, &c.

D A V. R A E.



